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Supreme Court, U.S.
FILED
APR 29 2004
OFFICE OF THE CLERK

No. 03-929

In the

Supreme Court of the United States

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

THOMAS V. WILHELM
Of Counsel
2636 Dixie Highway
Waterford, MI 48328
Telephone: (248) 618-7280

GREGORY T. BRODERICK
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

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Petitioner, John A. Rapanos, respectfully moves this Court for an order vacating its denial of the petition for writ of certiorari, entered on April 5, 2004. This Court should grant the petition to review the merits or to set aside Petitioner's conviction. This petition for rehearing is timely filed in accordance with Supreme Court Rule 44.2.

This case offers compelling reasons for rehearing. This petition presents substantial grounds not previously presented (Rule 44.2) which the Court should consider—due process under the Clean Water Act (CWA) requires that the scope of federal jurisdiction be clearly defined.

Violations of the CWA carry severe penalties, including substantial fines and lengthy prison terms. *See* 33 U.S.C. §§ 1319(c)(1) and (2). After Mr. Rapanos was convicted of filling isolated wetlands without a federal permit, the government urged the trial court to give Mr. Rapanos *sixty-three* months in prison. But the trial judge, Chief District Judge Zatkoff, found such a sentence unwarranted because moving soil from one end of the property to another caused virtually no harm or risk to the environment. *See United States v. Rapanos*, 235 F.3d 256, 259 (6th Cir. 2000) (citing the lower court). With clear outrage, Judge Zatkoff stated:

> So here we have a person who comes to the United States and commits crimes of selling dope and the government asks me to put him in prison for ten months. And then we have an American citizen who buys land, pays for it with his own money, and he moves some sand from one end to the other and government wants me to give him sixty-three months in prison. Now, if that isn't our system gone crazy, I don't know what is. And I am not going to do it.

Id. at 260.

This case is an example of the dangers inherent in a broadly interpreted regulatory scheme like the CWA. In their dissent to the denial of the petition for writ of certiorari in *Hanousek v. United States*, 528 U.S. 1102, 120 S.Ct. 860 (2000), Justice Thomas and Justice O'Connor warned of the injustice that could and has occurred under this Act. *Id.* at 861. They note, for example, that in some circuits the CWA is interpreted as "public welfare legislation" that allows criminal conviction without proof of criminal intent. *Id.* They also note that some courts have interpreted the felony provision of the CWA so that "a person may 'knowingly' violate the statute even if he is not aware that he is violating the law." *Id.* n.2. The result, the Justices argue, is that the "CWA imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities." *Id.* at 861. These are not the type of activities that a reasonable person should know is subject to stringent regulation and substantial criminal sanctions. *See id.* at 860. Therefore, the Justices counsel that the CWA should not be interpreted so as to subject countless numbers of people to "heightened criminal liability" for ordinary conduct. *Id.* at 861.

But the fact of the matter is that the lower courts have already done so. The Sixth Circuit in this case has held that federal CWA jurisdiction extends to any water body, including wetlands, which has a potential hydrological connection to a navigable water, even though this Court has never upheld federal jurisdiction over isolated or nonadjacent wetlands like those found on Mr. Rapanos' property.

The lack of a clear statement of federal authority under the CWA in the face of Mr. Rapanos' criminal conviction, and imminent sentencing to federal prison, for placing sand in isolated wetlands on his property, violates the principles of fundamental fairness inherent in due process. *See Daniels v. United States*, 532 U.S. 374, 386 (2001).

Notwithstanding this Court's CWA jurisprudence, no one knows the extent of federal jurisdiction under the CWA. This is clear from the split among the lower courts, the spate of cases like this case which have been petitioned to this Court for clarification, and the reported inability of federal officials to apply the CWA in a consistent jurisdictional manner.

In this case, the federal government failed to prove an element of the crime for which Mr. Rapanos was convicted. Moreover, because this Court has not provided a clear statement of federal jurisdiction under the CWA, neither Mr. Rapanos, nor anyone else, could have known that the filling of wetlands twenty miles from the nearest navigable waters would be proscribed by the Act. Thus, Mr. Rapanos has been deprived of due process of law.

I

IN VIOLATION OF DUE PROCESS THE FEDERAL GOVERNMENT FAILED TO PROVE AN ELEMENT OF THE CRIME FOR WHICH MR. RAPANOS WAS CONVICTED

In *Fiore v. White*, 531 U.S. 225 (2001), the Petitioner was convicted of violating a Pennsylvania law that prohibited the operation of a hazardous waste facility without a state permit. Although the State conceded that Fiore had a permit, the State argued that Fiore had deviated so far from its terms that he could be charged under the statute for failure to have a permit. After Fiore's conviction, the state supreme court interpreted the statute determining that "the statute meant what it said: The statute made it unlawful to operate a facility *without* a permit; one who deviated from his permit's terms was not a person *without* a permit." *Id.* at 227. But the state courts refused to overturn the conviction. This Court granted certiorari to decide "whether Pennsylvania can, consistent with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit." *Id.* at 228.

This Court held that the "Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Id.* at 228-29. In *Fiore*, the State failed to prove that Fiore did not have a valid permit.

This case is similar. Mr. Rapanos was convicted of violating the CWA that prohibits the discharge of fill into navigable waters without a federal permit. Although the government conceded that the wetlands Mr. Rapanos is accused of filling are not navigable-in-fact, the government argued that these wetlands were "navigable waters" because they have a potential hydrological connection to navigable waters twenty linear miles away. After Mr. Rapanos' conviction, this Court decided *Solid Waste Agency* in which this Court determined that the CWA does not apply to waters that are not adjacent to navigable waters. To rule for the government, this Court stated, "we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 168 (2001).

Thus, as in *Fiore*, so in this case; Petitioner's conduct does not fall within the scope of the statute—properly interpreted—under which he was convicted. The federal government failed to prove an element of the crime—that the subject wetlands were *adjacent* to open or navigable waters. According to this Court's precedent, therefore, Mr. Rapanos' conviction and impending incarceration are not consistent with the demands of the federal Due Process Clause. *See Fiore*, 531, U.S. at 226. But, the Sixth Circuit has refused to overturn Mr. Rapanos' conviction, even on remand from this Court.

II

CRIMINAL PROSECUTION UNDER THE VAGUE AND UNCERTAIN JURISDICTION OF THE CWA AS INTERPRETED BY THE SIXTH CIRCUIT VIOLATES DUE PROCESS

"[D]ue process demands that criminal liability not be imposed when the accused cannot reasonably comprehend that the contemplated conduct is proscribed." *Ignorance or Mistake of Law—Will the Memory Ever Fade?:* People v. Marrero, 62 St. John's L. Rev. 114, 125-126 (1987), Athy Poulos-Mobilia. In this case, Mr. Rapanos had every reason to believe that his conduct was not proscribed by the CWA. The Act prohibits the discharge of fill material into "navigable waters" without a federal permit. The term "navigable waters" is not defined in the Act. Therefore, a plain reading of the statutory language suggests that the CWA would only apply to navigable-in-fact waters. Based on the plain text of the statute it would be incomprehensible to infer that the term "navigable waters" included isolated wetlands twenty miles from a navigable waterway. This Court came to the same conclusion in *Solid Waste Agency* where it determined that the term "navigable" shows that Congress relied on its traditional jurisdiction over navigable-in-fact waters for enacting the CWA. *Solid Waste Agency*, 531 U.S. at 172.

Moreover, in *Solid Waste Agency* this Court rebuffed the government's argument that section 404(a) is ambiguous and that the Court should extend *Chevron* deference to the Corps of Engineers' expansive interpretation that the CWA applied to nonnavigable, isolated, intrastate waters. *See Id.*

Based on the text of the CWA, Mr. Rapanos could not reasonably have comprehended that the filling of isolated wetlands on his property was proscribed by the CWA. Convicting a person of conduct he or she had no reason to believe was criminal is a clear due process violation.

Therefore, the courts have an obligation to interpret the CWA so as to effectively guide individual conduct.

1. Mr. Rapanos' Conviction Raises Grave Constitutional Questions; Therefore, Due Process Requires a Reasonable Interpretation of the Act That Avoids the Constitutional Conflict

In *Jones v. United States*, 529 U.S. 848 (2000), this Court stated as a "guiding principle," that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Id.* at 857 (citing among others to *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909)). In *Jones*, the Petitioner was convicted under a federal statute prohibiting arson of any building that might affect interstate commerce. The government argued that the home to which Jones set fire was connected to interstate commerce because the homeowner had a mortgage and insurance with out-of-state providers and the home used natural gas from out of state. *Id.* at 855. But this Court found that if it adopted the government's expansive reading of the act, "hardly a building in the land would fall outside the federal statute's domain." *Id.* at 857. Given this Court's concerns as expressed in *United States v. Lopez*, 514 U.S. 549 (1995), wherein this Court invalidated a federal law prohibiting the mere possession of a gun in a school zone because the prohibited activity had nothing to do with commerce or economic activity, this Court rejected the government's troubling reading of the federal arson law: "We conclude that [the law] is not soundly read to make virtually every arson in the country a federal offense." *Jones*, 529 U.S. at 859. This Court, therefore, vacated the conviction.

Similarly, in *Solid Waste Agency*, this Court found that the government's assertion of authority over nonnavigable, isolated, intrastate waters, with a questionable connection to

interstate commerce, invoked the "outer limits" of Congress' Commerce Clause authority and raised "significant constitutional questions." *Id* at 172-74. Had this Court adopted the government's expansive interpretation of the act, hardly any water body in the land would fall outside the federal statute's domain. But as it had in *Jones*, this Court cited to *Lopez* for the proposition that Congress' authority "under the Commerce Clause, though broad, is not unlimited." *Id*. at 173. Thus, this Court stated, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id*. at 173 (citing *Edward J. DeBartolo Corp. v Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)). In a footnote, this Court expressly found that it was not Congress' intent to push the limits of congressional authority: nothing "in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation." *Id*. at n.3.

This Court concluded: "We thus read the statute as written to avoid the significant constitutional . . . questions raised by respondents' interpretation" of the CWA. *Id* at 174. Nevertheless, Mr. Rapanos was convicted of filling wetlands that have no more significant a connection to interstate commerce than the home set afire in *Jones* and the proposed filling of isolated ponds in *Solid Waste Agency*. Mr. Rapanos was convicted of filling wetlands twenty miles from the nearest navigable water. Like the "Migratory Bird Rule" invalidated in *Solid Waste Agency*, the interpretation of the CWA applied to Mr. Rapanos pushes the "outer limits" of Congress' Commerce Clause authority and raises significant constitutional questions. It is fundamentally unfair to convict Mr. Rapanos under an expansive interpretation of the CWA that raises "grave and doubtful constitutional questions" when this Court has already

adopted a reading of the Act that avoids the constitutional problems and excludes Mr. Rapanos' conduct from federal enforcement.

2. The CWA Is a Criminal Statute; Therefore, Due Process Requires an Interpretation of the Act in Favor of Lenity

Another "guiding principle" upon which *Jones* relied is the requirement that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 529 U.S. at 840. (Citing *Rewis v. United States*, 401 U.S. 808, 812 (1971).) And, as with the courts' duty to adopt an interpretation of an act that avoids constitutional problems, "when choice must be made between two readings of what conduct Congress has made a crime, it is appropriate, before choosing the harsher alternative, to require that Congress should have spoken in language that is clear and definite." (Citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).) Section 404(a) of the CWA prohibits the discharge of fill material into "navigable waters." This is not a "clear and definite" statement that a crime is committed when one fills a wetland that lies twenty miles from the nearest "navigable waters." Indeed, this Court has never found that Congress expressed the intent in the CWA, clearly or otherwise, that the filling of nonnavigable, isolated, intrastate waters is prohibited. To the contrary, this Court found in *Solid Waste Agency* that the "clear and definite" language in the CWA indicates Congress' intent to regulate traditional navigable waters and wetlands immediately adjacent to those waters. *Solid Waste Agency*, 531 U.S. at 167-72. Moreover, this Court has never held that the CWA covers wetlands that are not adjacent to navigable waters. It is, therefore, fundamentally unfair to convict Mr. Rapanos for conduct that Congress has not proscribed with "clear and definite" language.

3. The CWA Is a Federal Criminal Statute That Overlaps with State Authority; Therefore, Due Process Requires the Act to be Narrowly Construed

This Court has instructed that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in the prosecution of crimes." *Jones*, 529 U.S. at 858 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). In *Jones* this Court found that to read the Act "as encompassing the arson of an owner-occupied private home would effect such a change for arson is a paradigmatic common-law state crime." *Id.* Therefore, in the absence of a clear statement to the contrary, this Court held that the act must be more narrowly construed. *Id.* at 859. The courts "should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain." *Jones*, 529 U.S. at 860 (Stevens & Thomas, JJ., concurring).

In *Solid Waste Agency*, this Court determined that the government's expansive reading of the CWA to cover all isolated, intrastate, nonnavigable waters "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency*, 531 U.S. at 173. According to this Court, permitting the government to claim federal jurisdiction over ponds and mudflats "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174. But rather than a clear statement from Congress that it desired to readjust the federal-state balance in this manner, this Court found that "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .' 33 U.S.C. § 1251(b)." Therefore, this Court read the statute as written and avoided the federalism questions raised by the government's expansive interpretation.

It is fundamentally unfair to convict Mr. Rapanos of a crime based on an interpretation of the CWA that alters the federal-state framework, when this Court has determined that Congress clearly expressed a desire *not* to impinge on the rights of states to regulate remote and isolated local water bodies, like the wetlands on Mr. Rapanos' property.

CONCLUSION

For the reasons stated above, the petition for rehearing should be granted.

DATED: April, 2004.

Respectfully submitted,

THOMAS V. WILHELM
Of Counsel
2636 Dixie Highway
Waterford, MI 48328
Telephone: (248) 618-7280

GREGORY T. BRODERICK
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

CERTIFICATE OF COUNSEL

As counsel for Petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is based on the grounds specified in Rule 44.2

_____

M. Reed Hopper